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No. 99-1379

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, applies to contracts of employment.

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This federal court action arises out of a California state court lawsuit brought by a California resident alleging state law employment discrimination claims against his employer.

Respondent Saint Clair Adams ("Mr. Adams") lives in Sonoma County, California. In November 1995, Mr. Adams accepted employment as a salesperson with petitioner Circuit City Stores, Inc. ("Circuit City") at its retail store in Santa Rosa, California. Ninth Circuit Excerpts of Record ("ER") 4, 5. As a condition of employment, Mr. Adams was required to sign an application form obligating him to submit to arbitration any employment dispute with Circuit City that might thereafter arise. Joint Appendix ("J.A.") 12-17.

In November 1997, Mr. Adams filed the underlying employment discrimination lawsuit in the Superior Court of the State of California for the County of Sonoma, against Circuit City (a Virginia corporation with retail stores throughout California and the United States) and three of his Circuit City supervisors (each California residents). ER 2-4.

Mr. Adams' First Amended Complaint alleges that each of the defendants subjected him to on-the-job harassment and retaliation based upon his sexual orientation, in violation of, *inter alia*, California's Fair Employment and Housing Act, Cal. Govt. Code §12900 *et seq.*, and state common law prohibitions against constructive discharge and intentional infliction of emotional distress. ER 4, 14-26. Mr. Adams' Complaint also includes a declaratory relief claim, challenging the enforceability of the pre-dispute arbitration provision that Mr. Adams, like all Circuit City employees, was required to sign as a condition of his employment. Ninth Circuit Supplemental Excerpts of Record ("SER") 1-30; ER

44-48. Mr. Adams' complaint does not allege any federal claims.[1]

In January 1998, Circuit City filed a petition in the United States District Court for the Northern District of California to enjoin Mr. Adams' state court action and to compel arbitration of Mr. Adams' claims. Circuit City invoked that court's diversity jurisdiction and the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq.*

Mr. Adams opposed Circuit City's petition on the ground, *inter alia*, that Circuit City's arbitration provision was an unconscionable contract of adhesion under California law. Mr. Adams asserted that the arbitration provision lacked mutuality, because it required employees to arbitrate all of their employment-related claims against Circuit City without imposing a corresponding obligation upon Circuit City to arbitrate any of its employment-related claims against the employees. J.A. 12-14, 21-23. Mr. Adams also challenged as unconscionable Circuit City's dispute resolution procedures, which: 1) placed a cap on the amount of front pay or punitive damages an arbitrator could award (J.A. 35-36); 2) imposed a one-year statute of limitations on all claims, including claims with longer limitations periods under California law (J.A. 13, 23); 3) obligated employees to pay half the cost of arbitration, including arbitrator fees and expenses, subject to cost-shifting only at the arbitrator's discretion (J.A. 33-34); 4) vested complete discretion in the arbitrator to decide whether to award attorney's fees to a prevailing employee, even on statutory discrimination claims (J.A. 34-35); and 5) did not require the arbitrator to provide findings or reasoning to support the arbitration award (J.A. 32).

[1] Petitioner refers in its Statement of Facts to an Arbitration Request Form signed by Mr. Adams after he filed his state court lawsuit. Pet. Br. 5. Mr. Adams represented to the district court that he signed that form as a protective measure to comply with the statute of limitations. Petitioner does not contend that Mr. Adams thereby waived any rights.

The district court rejected Mr. Adams' challenges, relying upon "the strong state and federal [pro-arbitration] policy, particularly the federal policy announced in the [Federal] Arbitration Act," and concluding that Circuit City's mandatory pre-dispute arbitration procedures do not "amount to the extreme one-sidedness that's required for a finding of unconscionability as a matter of law." J.A. 50. The district court thereupon enjoined Mr. Adams' state court action and compelled arbitration. J.A. 43-45.

The Ninth Circuit reversed. Relying on *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999) (Opp. App. 1a-27a), and finding that Mr. Adams' employment application agreement with Circuit City constituted a "contract[] of employment" within the meaning of the FAA §1 "contracts of employment" exclusion, the Court of Appeals held that Mr. Adams' arbitration agreement was not covered by the FAA. J.A. 53-56. The Ninth Circuit directed the district court to dismiss Circuit City's petition, allowing Mr. Adams' state law discrimination suit to proceed in the California state court in which it had been filed. J.A. 56.

This Court granted Circuit City's Petition for Writ of Certiorari, limiting the grant to the first Question Presented – to what extent, if at all, does the FAA applies to contracts of employment? That question was reserved in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), with two dissenting Justices reaching the issue and concluding that Congress did not intend the FAA to cover *any* workers' contracts of employment. *Id.* at 36-43 (Stevens, J., with Marshall, J., dissenting).[2]

[2] Although petitioner asserts that it "has not waived" its argument that Mr. Adams' signed employment application is *not* a "contract of employment" within the meaning of the FAA (Pet. Br. 7 n.3), this Court denied *certiorari* on petitioner's second Question Presented. This case thus proceeds on the premise that the Ninth Circuit correctly ruled that the parties' agreement – a contract between an employer and employee that

SUMMARY OF ARGUMENT

Congress enacted the FAA in 1925 to make agreements to arbitrate commercial disputes enforceable in federal court. When labor objected to the FAA bill as introduced because it might reach arbitration provisions in worker contracts of employment, the bill's principal proponents responded that "[i]t is not intended that this shall be an act referring to labor disputes at all," and Congress promptly adopted the suggestion that explicit language be inserted to exclude "workers' contracts" from the scope of the Act. *See infra* at pp. 13-15. FAA §1, as enacted, thus excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the Act's coverage. Although FAA §2's coverage provision appeared not to include contracts of employment at all (because they were not "contracts *evidencing a transaction involving commerce*"), any uncertainty in this regard was resolved by §1's explicit exclusion for contracts of employment.

In 1925, the §1 statutory phrase "workers engaged in . . . commerce" was a well-established term of Commerce Clause art that encompassed *all* workers within the commerce power.

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applied throughout the employment relationship and created a mechanism for adjudicating disputes over the interpretation and enforceability of the terms and conditions of employment (J.A. 12-17) – *is* an FAA "contract of employment." *See* Opp. Cert. 4-6. Petitioner warns that if such agreements are deemed "contracts of employment" for purposes of the FAA §1 exclusion, employers will circumvent state law regulation of their employment arbitration agreements by the "artifice" of having "industry associations or other third party entities" act as "straw men" to impose such agreements on the employers' workers. Pet. Br. 37. Whether such a subterfuge would be permitted is not at issue here, although petitioner's warning underscores the enormous disparity in bargaining power between employers and their prospective employees – a disparity that was brought to Congress' attention in 1925 as a basis for excluding workers' "contracts of employment" from the FAA. *See infra* at pp. 12-13.

FAA §1 thus excluded from the Act the contracts of employment of every worker who might have been covered by the Act. There were no workers whose contracts of employment could be said to be "contracts evidencing a transaction involving commerce" under the FAA §2 coverage provision who would not have been excluded as "workers engaged in . . . commerce" under the FAA § 1 exclusion — the statutory phrases "engaged in commerce" and "involving commerce" both reached to the full extent of the commerce power. Indeed, dictionaries of the period define "involving" and "engaged in" as synonyms. Considerations of sound grammar, rather than any intent to limit the scope of FAA §1's exclusion in relation to FAA §2's coverage, explain why Congress used different words in the two sections; in common parlance, "workers" could not be said to be "involving" commerce any more than "transactions" could be said to be "engaged in" commerce.

Application of the canons of *ejusdem generis* and *noscitur a sociis* to FAA §1's text does not, as petitioner Circuit City claims, justify transformation of the broad §1 exclusion of "any other class of workers engaged in foreign or interstate commerce" into the far more limited exclusion of "workers directly engaged in transportation of goods in commerce." It was well-settled in 1925 that "commerce" includes more than "transportation." If Congress had meant to exclude only those workers "engaged in . . . *transportation*," §1 would have said so, using other statutes of the period as its model. Moreover, §1 explicitly refers to "*any other* class of workers," an expansive term that precludes petitioner's narrow reading of the §1 text. And, even if petitioner's statutory construction argument had some basis in §1's text or in the statutory interpretation canons, that argument would still have to be rejected because it attributes to Congress an intent that makes no sense. Congress would not have *excluded* from the FAA the contracts of those workers most clearly within the 1925 commerce power, while *including* the

contracts of workers as to whom its commerce power was most doubtful.

None of petitioner's pro-arbitration policy arguments support a different conclusion, because none are relevant to what the FAA Congress intended. The only relevant policy in this case is federalism. If the FAA applies to contracts of employment, that federal law would preempt the States from exercising their traditional police powers over the employment relationship. As this Court has emphasized, federal statutes are not to be interpreted to displace traditional State powers unless Congress' preemptive intent is "absolutely clear." Given the language, background, and structure of the FAA, that standard of certainty is not be met here.

ARGUMENT

This statutory interpretation case turns on two provisions of the Federal Arbitration Act. The FAA's coverage provision (§2), enacted in 1925 and never amended, states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [9 U.S.C. §2]

The FAA's definition of "commerce"/exclusion of "contracts of employment" provision (§1), enacted at the same time and also never amended, defines "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation," and then states:

> . . . but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. [9 U.S.C. §1]

These provisions make manifest Congress' intent *not* to have the FAA apply to *any* "contracts of employment." In the ordinary meaning that would have been given to §2 in 1925, a "contract of employment" was neither a "maritime transaction" nor a "contract evidencing a transaction involving commerce." And, to the extent §2's language was ambiguous, and thus open to a construction that included "contracts of employment," the §1 "contracts of employment" exclusion cured such ambiguity by explicitly excluding from the potential coverage of §2 all such contracts as a class. Considered in the context of pre-1925 Commerce Clause jurisprudence, Congress' exclusion of the employment contracts of "any other class of workers engaged in foreign or interstate commerce" signified its intent to exclude all "contracts of employment" within Congress' "commerce power to the full" – to borrow the language and logic of *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). As the recognized scope of the commerce power has expanded, so has both the scope of the §2 coverage provision *and* the scope of the §1 exclusion.

The drafters and principal proponents of the FAA bill made clear that the legislation was a "commercial arbitration act," that "it was not the intention of this bill to make an industrial arbitration in any sense," and that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by stating 'but nothing herein shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate or foreign commerce.'" *See infra at* pp. 13-15. Labor in fact *did* "object[] . . . to the inclusion of workers' contracts" in the FAA. And, to meet that objection, "the law's scheme" *was*

amended by Congress through the adoption of the proposed "contracts of employment" exclusion.

Against that background, the only rational reading of FAA §1 and §2 is that Congress drafted §1 and §2 *in pari materia* to ensure that the FAA would exclude all contracts of employment from coverage, both then and in the future. The §1 exclusion responded to labor's concerns about the disparity in negotiating power between employers and workers. No one suggested that this imbalance existed only in certain sectors of the economy within Congress' commerce power but not in others, or that labor's concerns could be addressed by an FAA exclusion of only some classes of workers.

To be sure, petitioner Circuit City urges a quite different interpretation of FAA §1 and §2. Petitioner begins by asserting that §2's "contract evidencing a transaction involving commerce" language is general enough to include "contracts of employment." Petitioner then argues that in 1925, "involving commerce" was a broad term of Commerce Clause art invoking the full commerce power and that "engaged in commerce" was a narrow term of art. It follows, claims petitioner, that by reason of this difference and of the application of the canons of *ejusdem generis* and *noscitur a sociis* to the §1 "contracts of employment" exclusion provision, Congress must have intended to exclude from the Act only a subclass of workers within its commerce power – seamen, railroad employees, and those whom petitioner describes as workers "directly engaged in the interstate transportation of goods in commerce." But petitioner's reading of the FAA, as we show below, is fatally flawed in each of its particulars and as a whole.

• Petitioner's premise that "involving commerce" and "engaged in foreign and interstate commerce" were critically different Commerce Clause "terms of art" in 1925 – the first

broad and the second narrow – is historically insupportable. Congress had never used (and has not since used) the Commerce Clause phrase "involving commerce" except in the FAA. And, the phrase persons "engaged in commerce" was the common phrase that Congress used at that time to invoke the *full* extent of its commerce power.

• Petitioner misuses the canons of *ejusdem generis* and *noscitur a sociis* to work an impermissible transformation of the statutory phrase "any other class of workers engaged in foreign or interstate *commerce*" into the quite different phrase "any other class of workers engaged in *transportation of goods* in foreign or interstate commerce." The term "commerce" is specifically defined in the very sentence of the FAA containing the statutory phrase that petitioner seeks to transform, and neither that definition nor common usage limits "commerce" to "the transportation of goods." Moreover, Congress in 1925 had considerable experience enacting statutes limited to the transportation industry or transportation industry workers only, and thus had models readily available if that was FAA §1's intended limited scope. And, neither of petitioner's canons provide a basis for limiting Congress' expansive phrase "*any other* class of workers engaged in . . . commerce." As this Court has recognized, Congress uses the phrase "any other" to delineate a broad category defined in its own terms, not a category limited by narrow reference to surrounding statutory terms.

• Petitioner does not offer any explanation for, or response to, the statements by the drafters and principal proponents of the FAA that: the Act was enacted to facilitate commercial arbitration, not employment arbitration; and that labor's objection to FAA coverage of the latter agreements would be fully resolved – as indeed that objection was – by excluding workers' contracts of employment as a class from the FAA's coverage.

• Finally, petitioner's interpretation of FAA §1 and §2 renders the Act entirely irrational with respect to which workers' employment contracts are covered. Petitioner attributes to Congress the supremely unlikely intention of regulating under the FAA, and thereby displacing state lawmaking authority to regulate, workers at the fringes (at best) of Congress' commerce power (those workers not "engaged in" commerce but nonetheless having contracts of employment "evidencing transactions involving commerce"), while excluding from the FAA, and thereby preserving state lawmaking authority over, the transportation industry workers who are at the core of Congress' commerce power. Congress, of course, never stated any such intention or offered any rationale for this purported distinction between transportation workers and other workers. Nor does petitioner suggest any cogent *post hoc* explanation for why Congress may have formed such an extraordinary intention or drawn such an inexplicable distinction. The entire weight of petitioner's argument for FAA coverage here, and for the corresponding preemption of California law, thus rests upon the proposition that Congress inverted basic federalism principles for no discernible substantive purpose.

I. The Legislative Background To The FAA's Coverage Provision And "Contracts Of Employment" Exclusion

Congress enacted the FAA 75 years ago, when the scope of the Commerce Clause power to regulate "foreign and interstate commerce" was narrow and the current set of conventions for delineating the Commerce Clause scope of congressional enactments had not been established. It therefore facilitates an understanding of the FAA's Commerce Clause provisions to place the FAA in its historical context at the outset – by retracing the steps taken in drafting and amending the federal arbitration bill – and then to turn to the statutory text and to the dispositive

question of the proper interpretation of that text as the enacting Congress would have understood it.[3]

Throughout the early part of the 20th century, the common law rule in many states prohibited judicial enforcement of pre-dispute arbitration agreements. This common law rule, which left the business community no enforceable means of settling commercial disputes other than through litigation, became the subject of growing criticism throughout the commercial bar. In 1920, the American Bar Association ("ABA") therefore directed its Committee on Commerce, Trade and Commercial Law to prepare a report and to draft legislation to promote "the further extension of the principle of commercial arbitration." Report of the 43rd Annual Meeting of the ABA, 45 ABA Rep. 75 (1920).

The result of the ABA Committee's efforts was the proposal for federal commercial arbitration legislation that became the FAA. On December 20, 1922, that federal arbitration bill, drafted by the ABA Committee in consultation with Secretary of Commerce Herbert Hoover, was simultaneously introduced by Senator Sterling in the Senate (S. 4214) and by Representative Mills in the House (H.R. 13522).[4]

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[3] *See e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979) (statutory language must be construed in its historical context as the enacting Congress would have understood it); *MCI Telecommunications v. American Telephone & Telegraph Co.*, 512 U.S. 218, 228 (1994).

[4] Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary (hereinafter "Hearing"), 67th Cong., 4th Sess. 2 (1923); 64 Cong. Rec. 732, 797 (1922); 47 ABA Rep. 293-94 (1922). A history of the ABA's efforts is set forth at 50 ABA Rep. 356-62 (1925) and in Ian MacNeil, American Arbitration Law: Reformation, Nationalization, Internationalization (1992) ("MacNeil"); see also Hearing at 2-3. The business community's perceived need for less costly and time-consuming means of resolving commercial disputes,

As introduced, §2 of the FAA bill made valid and enforceable "written provisions for arbitration" in "any contract or maritime transaction or transaction involving commerce," and §1 defined "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

Shortly after the bill's introduction, it came to the attention of Andrew Furuseth, president of the International Seamen's Union of America. Mr. Furuseth strongly objected to the bill's potential "compulsory labor" impact on "the seaman . . . the railroadman . . . [and] sundry other workers in 'interstate and Foreign Commerce,'" explaining:

> [T]he bill provides for the re-introduction of *forced or compulsory labor* if the freeman through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the *seaman* and the hunger of the wife and children *of the railroadman* will surely tempt them to sign *and so with sundry other workers in "interstate and Foreign Commerce."* [Proceedings of the 26th Annual Convention of the International Seamen's Union

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and the commercial orientation of the proposed legislation, are discussed throughout the ABA Reports of the period and the FAA's legislative history, as well as in the contemporary accounts of its drafters. See MacNeil 29-31, 31-42, 83-121 (1992); Paul H. Carrington and Paul H. Haagen, Contract and Jurisdiction, 1996 Supreme Court Review 331, 341 (1997); *Gilmer*, 500 U.S. at 39 (Stevens, J., dissenting); The United States Arbitration Law and Its Application, 11 ABA Journal 153-56 (March 1925); 48 ABA Rep. 290 (1923); 50 ABA Rep. 359-60 (1925).

> of America 203-05 (1923) (Appendix to Convention Proceedings) (emphasis supplied)][5]

Labor's objections were promptly heard by Congress and promptly addressed. At the January 31, 1923 Senate Judiciary Committee hearing on the proposed FAA, Mr. W.H.H. Piatt, Chair of the ABA Committee that had drafted the bill, told Congress:

> Mr. Piatt: . . . [T]here is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head or whatever he is of that part of the labor union that has to do with the ocean – the seamen –
>
> Sen. Sterling: Mr. Furuseth
>
> Mr. Piatt: Yes, some such name as that. He has objected to it and criticized it on the ground that the bill in its present form would affect, in fact, compel arbitration of the matters in agreement between the stevedores and their employers. Now *it was not the intention of this bill to make an industrial arbitration in any sense*, and so I suggest that insofar as the committee is concerned, *if your honorable committee should feel*

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[5] *See also* Proceedings of the 27th Annual Convention of the International Seamen's Union of America 100 (1924); Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. Lab. L. 282. 284 (1996) ("Finkin I"). The American Federation of Labor ("AFL") expressed similar objections. *See* Proceedings of the 45th Annual Convention of the AFL 52 (1925). And, labor was not alone in questioning the voluntariness of arbitration agreements in employment contracts. *See, e.g.*, Hearing at 9 (Senator Walsh: "The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all . . . . It is the same with a good many contracts of employment. A man says, 'There are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all").

> *that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this. [Hearing at 9 (emphasis supplied).][6]

In a letter to Senator Sterling also dated January 31, 1923 (reprinted in the Committee Hearing record in both 1923 and 1924), Secretary of Commerce Hoover made the almost identical point made by Mr. Piatt, and offered an almost identical suggestion, in the exact language that became the FAA §1 "contracts of employment" exclusion:

> *I have been, as you may know, very strongly impressed with the urgent need of a Federal commercial arbitration act.* The American Bar Association has now joined hands with the business men of this country to the same effect and unanimously approved, at its convention in San Francisco last August, a draft of a law prepared by its committee on commerce, trade, and commercial law and approved of by a large number of associations of business men. It was introduced in the Senate by you as S. 4214 and in the House of Representatives by Congressman Mills as H.R. 13522.

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[6] Although one of petitioner's *amici curiae* read Mr. Piatt's reference to "labor disputes" as limited to collective bargaining disputes, the meaning was broader. In fact, the contracts to which Mr. Furuseth was referring, called "shipping articles," were individual contracts of hire of individual seamen. *See* Proceedings of the 24th Annual Convention of the International Seamen's Union of America 27-28 (1921). By signing such articles, the individual seaman bound himself to serve on the voyage described in the articles. *Id.* at 88; Finkin I, 17 Berkeley J. Emp. Lab. L. at 287, 292-93; *see also* 29 U.S.C. §113 ("labor dispute" encompasses disagreements over individual contracts of employment).

> The clogging of our courts is such that the delays amount to a virtual denial of justice. I append an excerpt of the American Bar Association report which would seem to support that statement. I believe the emergency exists for prompt action and I sincerely hope that this Congress may be able to relieve the serious situation.
>
> *If objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by stating "but nothing herein shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate or foreign commerce."*
>
> If the bill proves to have some defects (and we know most legislative measures do), it might well, by reason of the emergency, be passed and amended later in the light of further experience. . . . [Hearing at 14 (emphasis supplied)].

Secretary Hoover's proposed exclusionary language was added to the FAA bill by the Senate Committee as an amendment to §1 of the bill.

The federal arbitration bill was not finally acted upon in the 1922-23 session of Congress. The bill was therefore reintroduced in the next session in December 1923, in both the House and Senate, this time with Secretary Hoover's §1 "contracts of employment" exclusion language. *See Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H.R. 646 before the Subcomm. of the Comm. on the Judiciary* (hereafter "Joint Hearing"), 68th Cong., 1st Sess. 2 (1924). Thereafter, in the Senate Committee, an additional amendment was made to the §2 coverage section (which had originally referred to a written arbitration provision "in any contract or maritime transaction or transaction involving commerce") by substituting for the original the current phrase, "in any maritime transaction or a contract *evidencing a transaction* involving commerce," thereby clarifying that the bill only reached "contracts

evidencing a transaction involving commerce." *See* S. 4214, 67th Cong., 4th Sess. §2 (1922); S. 1005, 68th Cong., 1st Sess. (1923); H.R. 646, 68th Cong., 1st Sess. (1924); S. Rep. 68-536, 68th Cong., 1st Sess. (1924).

The reintroduced bill continued to be presented as commercial arbitration legislation. Page after page of the printed record of the Joint Hearing emphasized the benefits of commercial arbitration and the need for the bill to secure those benefits. On the floor of Congress, the sponsors of the legislation repeatedly pointed to the bill's commercial character and to the benefits for merchants of voluntary arbitration agreements. Representative Graham, Chair of the House Committee on the Judiciary, stated:

> This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in *commercial* contracts and admiralty contracts – an agreement to arbitrate, when *voluntarily* placed in the document by the parties to it. . . . .
>
> It creates no new legislation; grants no new rights, except a remedy to enforce an agreement in *commercial* contracts and in admiralty contracts. [65 Cong. Rec. 1931 (Feb. 5, 1924) (emphasis supplied).]

Similarly, Representative Mills of New York, who had introduced the bill in the House, said in response to a request for an explanation of its provisions:

> This bill provides that where there are *commercial* contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract. [65 Cong. Rec. 11080 (June 6, 1924) (emphasis supplied).]

In short, the sponsors of the FAA and the members of Congress who spoke and voted for its passage stated that it was a commercial arbitration bill to deal with disputes arising out of commercial transactions: "The farmer who will sell his carload of potatoes, from Wyoming, to the dealer in the State of New Jersey, for instance." Joint Hearing at 7. The

legislative history does not contain a single reference suggesting that the FAA provided for employment arbitration or covered any worker contracts of employment. Nor did labor voice any objection to the FAA bill as amended to include the §1 "contracts of employment" exclusion. *See* Joint Hearing at 24 (noting absence of objectors); H. Rep. 68-96, 68th Cong. 1st Sess. 2 (1924) (same).

II. The Language of FAA §1 and §2 Manifests Congress' Intent to Exclude All Contracts Of Employment From the Act's Coverage

As we have seen, Mr. Piatt, Chair of the ABA Committee that drafted the FAA bill, averred that "it was not the intention of this bill to make an industrial arbitration in any sense," and Secretary Hoover, who participated in the drafting effort, added that, "If objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by" adding the "contracts of employment" exclusion language that was then added to §1 of the bill and enacted into law. We turn now to the text of the FAA §2 coverage provision and the §1 exclusion provision, which make manifest that the FAA does not cover workers' contracts of employment as a class.

A. In 1925, Contracts of Employment Did Not in Common Parlance "Evidence a Transaction Involving Commerce"

The FAA §2 coverage provision is phrased in unusual language. Rather than straightforwardly providing for the coverage of "written [arbitration] provisions" in "maritime contracts and other contracts involving commerce," §2 as amended and then enacted covers written arbitration provisions "in any maritime *transaction* or a contract *evidencing a transaction* involving commerce." In other words, §2 does not cover "contracts . . . involving commerce" as a class; only those "evidencing a transaction involving commerce" as a class.

Standing alone, §2's text thus raises the threshold question of whether a contract of employment would fairly and properly have been considered either a "marine *transaction*" or a "contract evidencing a *transaction* involving commerce" in 1925. In *Craft v. Campbell Soup Co.*, *supra*, the Ninth Circuit answered that question "no," after looking to the ordinary and accepted meaning in 1925 of the FAA's undefined terms "marine transaction" and "contract evidencing a transaction":

> As pertinent, when Congress passed the FAA in 1925, the term "transaction" commonly meant "[a] business deal; an act involving buying and selling." *Webster's Int'l Dictionary* 2688 (2d ed. unabridged 1939). *See also The Century Dictionary and Cyclopedia* 6426 (revised and enlarged ed. 1911) ("1. The management or settlement of an affair; a doing or performing: as, the *transaction* of business. 2. A completed or settled matter or item of business . . . ."). An employment relationship, however, is not commonly referred to as a "business deal" or as "an act involving buying and selling." Instead, the connotation of the phrase "transaction involving commerce" – as Congress would have understood it in 1925 – was of a commercial deal or merchant's sale. Therefore, the coverage section of the FAA, § 2, appears not to encompass employment contracts at all. *See* Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv. L. Rev. 591, 599 (1954) ("It is hard enough to think of any collective bargaining agreement or employment contract as evidence of a transaction involving commerce.") (internal quotation marks omitted); Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 Fordham L. Rev. 469, 557 (1993) ("[T]he FAA's reference to 'transaction involving commerce' might not have been understood in 1924 as including employment contracts."). [177 F.3d at 1085]

Neither petitioner Circuit City nor any of its *amici curiae* provide anything of substance to support a contrary reading of "maritime transaction" or "contract evidencing a transaction involving commerce." The Texas Employment Law Council does put forward the suggestion that §2 by its terms applies to contracts of employment because such contracts "evidence a transaction" comprising the "buying and selling of labor." TELC Br. 4. But, that reading both suggests an uncommon understanding of the term "transaction" and ignores that Congress by 1925 had declared that "[t]he labor of a human being is not a commodity or article of commerce." *See* Clayton Act, ch. 323, §6, 38 Stat. 731 (1914), 15 U.S.C. §17.[7]

B. Congress in FAA §1 Excluded From the Act All Contracts of Employment That Could Have Been Covered Through FAA §2

Any suggestion that FAA §2's general language was intended to encompass workers' employment contracts was put to rest when Congress adopted Secretary Hoover's amendment to FAA §1, stating: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

This language, at a minimum, eliminates from the potential reach of the Act all contracts of employment of seamen as a class and all such contracts of railroad employees as a class.

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[7] Petitioner would have it that in *Gilmer* this Court implicitly held that the employee contract there "evidenced a transaction involving commerce." Pet. Br. 37. But the question whether FAA §2 applies to contracts of employment was not raised in *Gilmer*, as the contract there was not a "contract of employment" between employer and employee, but (as the *Gilmer* Court emphasized) a registration statement between a broker and a national securities exchange which allowed the broker to sell securities in interstate commerce through interstate means of communication.

That much is beyond question, regardless of how FAA §2's "contract evidencing a transaction" language is construed.

The only point now in dispute is whether the final phrase of the §1 exclusion further eliminates from the potential reach of the FAA the employment contracts of all other workers within Congress' commerce power as a class, or only the contracts of the limited subclass of workers who transport goods in interstate commerce.

1. The FAA was drafted against the background of this Court's Commerce Clause decisions, which held that Congress had the commerce power to enact federal legislation regulating workers (and other persons) "engaged in" interstate commerce *and only such workers* (and other persons). In the face of those decisions, Congress' use of the common statutory term "workers engaged in . . . commerce" in §1 expressed its intent to exclude from the FAA's regulatory ambit the full class of workers within its 1925 commerce power. By excluding all workers "engaged in" interstate and foreign commerce, the FAA Congress renounced any intent to exercise its constitutionally-permissible regulatory authority over workers employment contracts.

(a) Prior to the enactment of the FAA, this Court had repeatedly held that Congress' commerce power was limited to persons directly in the "channels" of interstate and foreign commerce (*e.g.*, transportation and communication) or whose endeavors were so closely related to the channels of commerce "as to be practically a part of it." *Shanks v. Delaware, L. & W. R. Co.*, 239 U.S. 556, 558 (1916). An electric lineman working at a powerhouse supplying current to interstate trolley cars was within the commerce power (*Southern Pacific Co. v. Indus. Accident Comm.*, 251 U.S. 259, 262-63 (1920)), as was an iron worker repairing a bridge over which interstate railroads traveled (*Pedersen v. Delaware, L & W R. Co.*, 229 U.S. 146, 152-53 (1912)). But

workers who performed work at any remove from the channels of commerce, such as workers who produced goods for interstate shipment and use, were beyond the Commerce Clause's scope. In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), for example, this Court struck down a child labor law that regulated the employment relationships of workers who produced goods shipped in interstate commerce, explaining that "[t]he making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof." *Id.* at 272.

In its early 20th century Commerce Clause cases, moreover, this Court used the phrase persons "engaged in commerce" to describe the class of persons constitutionally subject to the commerce power, as distinct from the class of persons outside the commerce power whom Congress could not constitutionally subject to Commerce Clause regulatory statutes. *See, e.g, Second Employers Liability Cases* (*Mondou v. New York, N.H. & H. R. Co.*), 223 U.S. 1, 48-49 (1912) ("Congress, in the exertion of its power in interstate commerce, may regulate the relations of common carriers by railroad, and their employees, while both are *engaged in* such commerce, subject always to the . . . qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and employees are engaged").[8]

Against that jurisprudential background, Congress by 1925 was accustomed to invoking its full commerce power through the statutory term persons "engaged in commerce." For example, the 1903 version of the Federal Employers' Liability Act, ch. 976, 32 Stat. 943 (1903), applied to "every common carrier *engaged in* [interstate] trade or commerce."

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[8] *See also id.* at 46-47; *First Employers Liability Cases*, 207 U.S. 463, 501 (1907); *Alaska S.S. Co. v. McHugh*, 268 U.S. 23, 27 (1925).

(Emphasis supplied). The Safety Appliance Act, ch. 196, §1, 27 Stat. 531 (1893), referred to common carriers "*engaged in* interstate commerce by railroad." (Emphasis supplied). And, several provisions of the Clayton Act used the phrase "*engaged in*" to identify classes of persons and companies covered by the Act. *See, e.g.*, Clayton Act, ch. 323, §2, 38 Stat. 730 (1914) ("any person engaged in commerce . . ."); *id.* §7, 38 Stat. 731 ("No corporation engaged in commerce shall acquire. . ."); *id.*, §10, 38 Stat. 734 ("No common carrier engaged in commerce shall have any dealings in securities . . .").

The FAA §1 exclusion is of a piece with those statutes. Because the term "engaged in commerce" was understood in 1925 to state the full reach of the commerce power with regard to workers, Congress' use of that phrase in §1 shows its intent to exclude all workers' employment contracts that it could constitutionally reach. *See* Cox, *supra*, 67 Harv. L. Rev. at 598.

(b) Petitioner Circuit City responds that the statutory phrase "engaged in . . . commerce" was used in the amended Federal Employers' Liability Act ("FELA") to signify *less* than the full commerce power. Pet. Br. 17-18, *citing* FELA, as amended, 35 Stat. 65 (emphasis supplied). But petitioner misreads both the language of FELA and this Court's FELA Commerce Clause cases. The amended FELA Commerce Clause provisions were *not*, as petitioner asserts, "virtually identical" to FAA §1 (Pet. Br. 17); rather, the FELA provisions were distinctly different from FAA §1, and that difference was decisive in this Court's FELA cases.

The starting point is the 1906 version of FELA, which made "every common carrier *engaged in trade or commerce* . . . liable to *any* of its employees" for injuries caused by the employer's negligence, *without regard* to whether the injured employee was himself *engaged in commerce*. FELA, ch. 3073, §1, 34 Stat. 232 (1906) (emphasis supplied). This

Court held the 1906 FELA unconstitutional, because Congress did not have the Commerce Clause power to extend the Act's "all-embracing" provisions to employees who were *not* themselves engaged in commerce. *First Employers Liability Cases*, 207 U.S. at 497. This version of FELA was invalidated because it "sought to regulate the liability of interstate carriers for injuries to any employee even though his employment had no connection whatever with interstate commerce." *Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342, 353 (1913).

In response to this Court's ruling, Congress amended FELA to cover only employers and workers engaged in commerce *and* to add a temporal limitation. The amended Act, which is the version upon which petitioner relies, applied to "every common carrier by railroad, *while* engaging in commerce between any of the several States . . .," and it made such railroad liable for negligence only to an employee "suffering injury *while* he is employed by such carrier *in* such commerce." FELA, ch. 149, §1, 35 Stat. 65 (1908) (emphasis supplied). Petitioner's FELA argument entirely ignores the temporal limitations in the amended FELA Commerce Clause provisions and their significance.

In the *Second Employers Liability Cases*, this Court upheld the constitutionality of the amended FELA after concluding that "Congress, in the exertion of its power in interstate commerce, may regulate the relations of common carriers by railroad, and their employees, *while both are engaged in such commerce* . . ." 223 U.S. at 48-49 (emphasis supplied). In subsequent cases, the Court explained that in amending FELA to make it constitutional, Congress had cut back FELA's scope further than necessary to comply with the Commerce Clause, and that Congress could have saved FELA without adding the temporal limitation – *viz*, by providing that FELA covered railroads engaged in commerce *and* their workers engaged in commerce without regard to the

job function the worker was performing at the moment of injury.[9] None of these cases, however, held that the FELA phrases "engaging in commerce" and "employed . . . in . . . commerce," absent the temporal limitation ("*while* engaging in commerce" and "*while* employed by such carrier in such commerce"), extended to less than the full extent of the commerce power.

The sum of the matter is this. At the time here in question, this Court and Congress routinely used the term, persons "engaged in commerce," to delineate the *full* class of persons within the commerce power. We know of *no* case or statute in which that phrase was taken to be an invocation of less than the full commerce power. Although the amended FELA was held to be a limited invocation of the commerce power, that was only by reason of FELA's temporal limitation to workers "suffering injury *while* engaged in [interstate] commerce." (Emphasis supplied). Nothing in FELA or this court's FELA cases comes close to showing that, as of 1925, the phrase "workers engaged in commerce" invoked less than Congress' full commerce power.

2. Because the recognized scope of the Commerce Clause in 1925 was narrower than the recognized scope of the Commerce Clause today, the question next arises whether the FAA §1 and §2 Commerce Clause provisions should be read

[9] For example, in *Illinois R.R. Co. v. Behrens*, 233 U.S. 473 (1913), the Court recognized that Congress constitutionally *could have* extended FELA to workers, like the decedent there, who performed closely related interstate and intrastate functions. But the Court concluded that Congress instead, as a statutory matter, had limited the Act beneath what the Commerce Clause permitted by adding the element of "whether the particular service being performed at the time of injury, isolatedly considered, was in interstate or intrastate commerce." *Id.* at 477. This temporal limitation, which is not present in FAA §1, is how the FELA Congress manifested its intent *not* to apply the amended Act's protections to all injuries suffered in workplace accidents by railroad workers engaged in interstate commerce. *Id.* at 478.

dynamically (as expanding with the modern Commerce Clause's scope) or statically (as preserved in the limited 1925 Commerce Clause's scope). That question is resolved by this Court's analysis in *Allied-Bruce Terminix*, which concluded, in a rationale that applies with equal force to FAA §1, that the FAA §2 coverage provision should be read dynamically.[10]

[10] Petitioner would pretermit inquiry into the FAA Congress' intent by citing two 1970's Clayton Act cases, which petitioner characterizes as holding that the statutory phrase "engaged in commerce" must always be construed as if the enacting Congress had adopted that language today, regardless of the scope of the Commerce Clause or the actual intent of Congress at the actual time of enactment. Pet. Br. 15. Petitioner misstates both cases, neither of which reached the *Allied-Bruce Terminix* issue.

In *Gulf Oil Corp. v. Copp. Paving Co.*, 419 U.S. 186 (1974), the Government argued that the Clayton Act's "engaged in commerce" language manifested Congress' intent to reach to the full extent of its commerce power because, when that Act was adopted in 1914, "the 'in commerce' language was thought to be coextensive with the reach of the Commerce Clause." 419 U.S. at 201. This Court acknowledged that "[t]his argument from the history . . . of the Clayton Act is neither without force nor without at least a measure of support," but did not decide the issue because there was no showing that the activity at issue was within the commerce power as now understood. *Id.* at 201-02. Later that Term, the Government made the same argument in *United States v. Amer. Bldg. Maint. Indus.*, 422 U.S. 271, 277 (1975), but again the Court did not reach it; this time because the Clayton Act had been amended and reenacted *in 1950*: "[W]hether or not Congress in enacting the Clayton Act in 1914 intended to exercise fully its power to regulate commerce, . . . the fact is that when section 7 [of the Clayton Act] was reenacted *in 1950*, the phrase 'engaged in commerce' had long since become a Commerce Clause term of art, indicating a limited assertion of federal jurisdiction," and Congress by deliberately choosing to preserve that language in the course of making "sweeping changes" to the Clayton Act indicated its "intent, at least in 1950, not to apply . . . the Clayton Act to the full range of corporations potentially subject to the commerce power." *Id.* at 279-82 (emphasis supplied).

Unlike Clayton Act §7, FAA §1 and §2 have never been substantively amended and reenacted. When Congress in 1947 reenacted the FAA into positive law in Title 9, codifying the Statutes At Large into the U.S. Code

In *Allied-Bruce Terminix*, the Court considered the FAA §2 term "involving commerce" – a Commerce Clause term that, unlike "engaged in commerce," had no accepted meaning in 1925 and has never been used since. 513 U.S. at 273. As the first step in its analysis, the Court determined, from the "language, background and structure" of the Act, that Congress in FAA §2 intended "to exercise [its] commerce power to the full." *Id.* at 277. That being so, the Court held in the second part of its analysis that although "[t]he pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be so," the scope of the §2 Commerce Clause provision must be read as "expand[ing] along with the expansion of the Commerce Clause itself." *Id.* at 273-77.

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without any change in language, that reenactment was not substantive but part of a series of housekeeping bills to "enact into positive law all of the titles of the United States Code." H.R. Rep. No. 80-255 1 (1947). The House Judiciary Committee thus explained: "No attempt is made in this bill to make amendments in existing law. That is left to amendatory acts to be introduced after the approval of this bill." *See also* 93 Cong. Rec. 5029, 5043 (1947) (remarks of Rep. Robison) ("This bill makes no change in existing law"). This Court has properly rejected efforts to squeeze substantive significance from such a recodification. *See Fourco Glass Co. v. Transamerica Products Corp.*, 353 U.S. 222, 227-28 (1957). Just as Congress' codification of the FAA cannot be made into a substantive reenactment, that codification of the Act without amendment cannot be made into congressional acquiescence in petitioner's proffered construction of FAA §1. Indeed, in 1947, the *only* reported appellate decision on the issue held, contrary to petitioner's position, that the FAA does *not* cover employment contracts at all. *See Gatliff Coal. Co. v. Cox*, 142 F.2d 876, 882 (6th Cir. 1944). If congressional silence in 1947 meant anything, it was that Congress *approved* the construction of §1 that excluded all contracts of employment within the commerce power from the coverage of the Act.

When the FAA was enacted in 1925, the Commerce Clause scope of the §2 coverage provision and §1 exclusion provision were coterminous. The "language, background, and structure" of the Act demonstrate that *both* provisions were an "exercise [of] Congress' commerce power to the full." *Id.* at 273, 277. Thus, even if a worker's contract of employment could be considered a "contract evidencing a transaction involving commerce," the employment contract would still be excluded from the FAA by §1, because the worker would necessarily be a "worker engaged in . . . commerce." All employment contracts that *could be said to be covered* by FAA §2 therefore were *excluded* by §1.

To maintain the FAA's statutory scheme – which excludes all contracts of employment by §1 that could be said to covered by §2 – the §1 Commerce Clause provision must expand just the §2 provision expands. As the Ninth Circuit concluded in *Craft*, a contrary interpretation of the FAA, – that reads §2's Commerce Clause provision dynamically while reading §1's statically – "would require us to hold [contrary to all reason] that Congress intended to *include* some employment contracts within the scope of the FAA *prospectively*, even though it *initially excluded* all employment contracts[, and to] attribute[] to Congress the ability to foresee the New Deal's expansion of the Commerce Clause." *See* 177 F.3d at 1088 (emphasis in original).[11]

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[11] Even if petitioner were correct that the scope of the FAA §1 exclusion should be based on what the term "engaged in commerce" is deemed to signify in post-1930s statutes (without regard to what the FAA Congress intended or how §1 relates to §2 in the FAA statutory scheme), the §1 exclusion would go well beyond the exclusion of transportation-of-goods-in-commerce workers. In modern terms, the workers "en gaged in commerce" are those "within the flow of interstate commerce – the practical, economic continuity in the generation of goods and ser vices for interstate markets and their transport and distribution to

III. Circuit City's Proffered Reading Of FAA §1 Can Not Be Squared With The Statutory Text

Petitioner Circuit City would have the final phrase of the FAA §1 exclusion – "any other class of workers engaged in foreign or interstate commerce" – say something quite different from what its words say: "any other class of workers *directly* engaged *in the interstate transportation of goods* in commerce." Petitioner would effect this dramatic transformation of the statutory language through a two-part analysis – but neither part of this analysis can survive scrutiny.

1. Petitioner contends that the §2 coverage provision ("involving commerce") was a Commerce Clause term of art signifying a broader invocation of the commerce power than was signified by the §1 exclusion provision ("engaged in commerce"), and that Congress therefore must have intended to create a gap between the §2 coverage provision and the §1 exclusion provision – a gap occupied by an FAA-covered subclass of workers who were not themselves "engaged in commerce," but who nonetheless had contracts of employment "evidencing a transaction involving commerce." This contention is wrong from beginning to end.

First, "involving commerce" was *not* a Commerce Clause term of art in 1925, much less a term with an established broad meaning. The phrase "involving commerce" had never been used in a Commerce Clause provision prior to 1925, and has never been so used since. Nor is "involving commerce" defined in the FAA to have a special meaning; although the

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the consumer." *Gulf Oil Corp. v. Copp Paving Co., supra*, 419 U.S. at 195; *Mitchell v. C.W. Vollmer & Co.*, 349 U.S. 427, 429 (1955). Workers like Mr. Adams, who sell goods that are manufactured in other states and countries and shipped interstate both before and after the point of sale, would therefore be *excluded*. *See, e.g.*, BNA, *The Fair Labor Standards Act*, §3.III at 105-13 (1999) (collecting cases concerning which workers are "engaged in commerce" for purposes of the FLSA, 29 U.S.C. §§206(a), 207(a)(1)).

Act defines "commerce" for all the Act's purposes, it does so without separately defining "involving commerce" or "engaged in commerce."

Second, and equally to the point, the phrase "workers engaged in commerce," as we have shown, was a common Commerce Clause term that was understood in 1925 to state the full reach of Congress' commerce power over workers. *See supra* at pp. 20-22. In the Commerce Clause jurisprudence at the time, there was no place within the scope of Congress' commerce power beyond "engaged in commerce" for "involving commerce" to have reached.

Third, in the common parlance of 1925, "involving" and "engaged" were often used as synonyms. Dictionaries of the period define "engaged" as, *e.g.*, "involved"; define "engage" as, *e.g.*, to "involve oneself" or to "become involved"; and define "involve" to include, among its usages, "to engage thoroughly."[12] Congress in FAA §2 thus used the term "involving commerce," based on its commonly understood usage, to express the same commerce power reach as the FAA §1 term of art, "engaged in commerce."

Where the terms "involving" and "engaged in" differed, then as now, was in their proper use in grammatical context – which explains why Congress used different words in FAA §1 and §2 to express the same exercise of its commerce power. Grammatically, Congress could not have used the same connective in both provisions. A "transaction" is *not* said to be "engaged in" something, yet workers *are* said to be

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[12] *See, e.g.*, Webster's First New International Dictionary (1917) (emphasis supplied) (defining "engaged" as: " . . . 4. *Involved* . . . ."; defining "engage" as: ". . . 2. To embark in a business; to take part; to employ or *involve one's self* . . . . 4. To become *involved* or entangled"; and defining "involve" as ". . . 7. To *engage* thoroughly; to occupy, employ or absorb."); Black's Law Dictionary (1933) (defining "engage" as "To employ or involve one's self . . .") .

"engaged in" something. Because "contracts evidencing a transaction involving commerce" is sound English usage – while "contracts evidencing a transaction engaged in commerce" is not – the former is what §2 says. And, because it is both customary English usage, and was the normal convention at the time, to speak of workers "engaged in commerce" rather than workers "involving commerce," the former is what §1 says. The fact that the FAA uses two terms, each in a syntactically appropriate way, can not be taken to signify a congressional intent to legislate more broadly in the §2 coverage provision than in the §1 exclusion provision and by so doing, to create a gap between the two.

2. Although petitioner Circuit City devotes much of its brief to the supposed distinction between "involving commerce" as a broad Commerce Clause term and "engaged in commerce" as a narrow term, that distinction, even if correct (and it is not), would move petitioner only a small part of the way toward its statutory interpretation goal. Demonstrating the *existence* of a gap between the Commerce Clause provisions in FAA §1 and §2 does nothing to delineate *which* workers who were not themselves "engaged in . . . commerce" under §1 would nonetheless be covered by the FAA by virtue of having contracts of employment "evidencing a transaction involving commerce" under §2.

Because petitioner's first argument could not, even if valid, explain *which* workers Congress intended the FAA to cover, petitioner goes on to its second argument, based on the twin canons of *ejusdem generis* and *noscitur a sociis* and on the guideline that where a statute has two equally plausible interpretations, courts should reject the one that would result in statutory surplusage. *See* Pet. Br. 23-23.

Canons of construction are aids to construing ambiguous statutory language, not a means "to defeat the obvious purpose of legislation" by imposing a limiting construction on language not reasonably susceptible to that limitation. *See,*

e.g., Gooch v. United States, 297 U.S. 124, 128-29 (1936); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 88-89 (1934). And, the statutory term "workers engaged in . . . *commerce*" cannot be deconstructed by the canons of construction to mean "workers engaged in *transportation of goods in commerce*."

First, "commerce" is a statutory term that is specifically defined in FAA §1 – and a term that was well understood in 1925 to include *more* than just the interstate transportation of goods. *See, e.g., Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 241 (1899) ("Interstate commerce . . . includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities"). That being so, as the statutes of the time attest, where Congress intended to limit a Commerce Clause provision to the class of workers engaged in the "interstate transportation of goods in commerce," that is what Congress said. Yet, Congress in the FAA did *not* choose to define the excluded "any other class of workers" as workers "engaged in the interstate or foreign transportation of goods." Instead, the FAA Congress used the common, well-understood, and more comprehensive phrase, "workers engaged in foreign or interstate commerce."[13]

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[13] Among the many statutes of the period that Congress could have taken as a model to limit FAA §1 to transportation workers only, had that been its intent, were: Act of July 15, 1913, ch. 6, §1, 38 Stat. 103 ("The provisions of this chapter shall apply to any *common carrier or carriers . . . engaged in the transportation of passengers or property* wholly by railroad, or partly by railroad and partly by water . . ."); Hours of Service Act, ch. 2939, 34 Stat. 1415, 1415-17 (1907) (applying to "common carrier[s] . . . and [their] employees, *engaged in the transportation of passengers or property by railroad*" in interstate commerce"); Interstate Commerce Act, ch. 104, §1, 24 Stat. 379 (1887) (applying "to any *common carrier or carriers engaged in the transportation of passengers or property* wholly by railroad; or partly by water when both are used, under a common control, management, or arrangement, for a continuous

Second, petitioner's argument that FAA §1 excludes transportation-of-goods-in-commerce workers only cannot be squared with the plain language of a crucial phrase in FAA §1 – "any other class of workers," which is a term of breadth, not limitation. When Congress uses the phrase "any other" to describe a residual category, it does so to indicate that the category (here, "any other class of workers engaged in . . . commerce") stands on its own, unlimited by reference to prior statutory terms.

In *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980), for example, this Court rejected efforts to apply *ejusdem generis* to the phrase "any other final action" in §307(b)(1) of the Clean Air Act Amendments of 1997, which provides for direct review of actions by the EPA Administrator under specifically enumerated provisions of the Act *and* for such review of "*any other final action* of the Administrator under this Act . . . ." 42 U.S.C. §7607 (b)(1) (emphasis supplied). Petitioner in *Harrison* made the *ejusdem generis* argument that the term "any other final action" must be read as limited

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carriage or shipment . . ."); Safety Appliance Act, ch. 196, §1, 27 Stat. 531 (1893) (applying to every common carrier "*engaged in interstate commerce by railroad*"); *id.* §2, §3, 27 Stat. 531 (1893); *id.* §6, 29 Stat. 85 (1896) ("Any *common carrier engaged in interstate commerce by railroad* . . ."); *id.* ch. 225, §1, 35 Stat. 476 (1908) ("It shall be unlawful for any *common carrier engaged in interstate or foreign commerce by railroad* . . ."); FELA, ch. 149, §§1, 2, 35 Stat. 65 (1908) ("Every common carrier by railroad . . ."); Erdman Act, ch. 370, §1, 30 Stat. 424 (1898) ("any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, . . . *engaged in the transportation of passengers or property* wholly by railroad, or partly by railroad and partly by water," and defining employees to "include all persons *actually engaged in any capacity in train operation or train service* of any description"); Act of March 4, 1921, ch. 172, §233, 41 Stat. 1445 (ICC shall formulate regulations for transportation of explosives "which shall be binding upon all *common carriers engaged in interstate or foreign commerce* which transport explosives or other dangerous articles . . .").

to only final actions like the specifically enumerated actions. The Court rejected the argument, concluding that the "fundamental" problem with applying *ejusdem generis* to the statutory text was the modifier "any": "[T]he phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely *any other* final action." *Id.* at 588-89 (emphasis in original).

Similarly, in *Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923), this Court rejected a proposed application of the *noscitur a sociis* canon to a statute granting the President power "[t]o modify, suspend, cancel or requisition any existing or future contract." While acknowledging that the term "requisition" is used in connection with private contracts rather than government contracts, the Court concluded that because Congress used the expansive phrase "any," Congress did not mean to limit the statutory power to private contracts. As the Court stated, "*any* existing or future contract,' read with literal exactness, includes all contracts, whether private or governmental." *Id.* at 519-22.

So too in FAA §1, if the legislative intent had been to exclude only a limited *subclass* of the class of workers engaged in commerce, the FAA Congress would not have expansively and unambiguously described the residual class as "any other class of workers engaged in commerce."

Third, petitioner's *ejusdem generis* argument depends upon the false premise that the *sole* characteristic shared by "seamen" and "railroad employees" is that both classes of workers transport goods in commerce. In truth, those two classes of workers share several more relevant common characteristics, not the least of which is that in 1925, seamen and railroad employees were the only private-sector classes of

workers whom Congress *could* regulate under the Commerce Clause that Congress *had* previously regulated.[14]

It is far more likely that the FAA Congress included the references in §1 to "seamen" and "railroad employees" for emphasis and to provide the two preeminant examples of the classes of "workers engaged in . . . commerce" that were excluded from the FAA, than that Congress included those references to make a veiled statement of an implicit intent to exclude transportation-of-goods-in-commerce workers only. That likelihood becomes all but a certainty when it is remembered that labor initially objected to the FAA bill because its provisions might cover "the seaman[,] the railroadman[, and] sundry other workers in 'interstate and Foreign Commerce'" (*supra* at p. 12) – language that is

[14] *See* 44 Stats. at Large, Pt. I (1926) (showing laws in effect on December 7, 1925), at 1437-43, 1447-55 (railroad employees), 1510-26 (seamen). Petitioner never explains why Congress would have referred to "seamen" and "railroad workers" as shorthand for describing the narrow class of workers directly engaged in the transportation of *goods* in interstate commerce, given that railroads and ships obviously move passengers as well. Nor does petitioner explain why "seamen" and "railroad employees" would not be characterized as employees of *common carriers* – a characterization that includes providers of telephone and telegraph service. *See First Employers Liability Cases*, 207 U.S. at 497; Interstate Commerce Act, ch. 104, 24 Stat. 382 (1887), as amended.

The artificiality of petitioner's *ejusdem generis* analysis is also highlighted by the very court of appeal cases upon which it relies, which formulate differently the scope of the FAA §1 exclusion, based on how the case characterizes the connection between seamen and railroad employees. *See Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971) ("employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce"); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("actually in the transportation industry"); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997) ("employed directly in the channels of commerce"); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("employees actually engaged in the channels of interstate commerce").

tracked almost word-for-word in the §1 exclusion, as proposed by Secretary Hoover to resolve fully labor's objection to the inclusion of "workers' contracts" in the bill, and as enacted.

Fourth, petitioner cannot support its proffered construction of §1 by relying on the proposition that statutes should be construed to avoid surplusage. There is no rule against redundancies requiring Congress to write statutes in the fewest words possible.[15] Nor is there any law of conciseness authorizing the courts to rewrite statutory provisions that make their point in more words than necessary, when each of those words serves a legitimate statutory purpose – such as providing detail, emphasis, or example, or reassuring objectors and potential opponents that their objections have been met and that there is no basis for opposition. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 347-48 (1998). *Russell Motor Car Co., supra, Gooch, supra, and Harrison, supra*, are more than sufficient to show that there is a wide congressional prerogative to draft statutory provisions with some redundancies, where that drafting approach, in Congress' judgment, effectively communicates its legislative intent.

To be sure, where there are two equally plausible constructions of statutory language, the courts will incline to

[15] Indeed, there are redundancies throughout the FAA, as in many statutes throughout the period. *See Southern R. Co. v. United States*, 222 U.S. 20, 25-26 (1911) (construing scope of Safety Appliance Act broadly to encompass all railroads engaged in interstate commerce, despite "redundant" clause "in connection with" that could be read as imposing limitation, because broader reading "is in accord with the manifest purpose" of statute). For example, in FAA §1 itself, there was no need for Congress to have referred to: "workers engaged in *foreign or interstate* commerce" (because "commerce" was defined earlier in that paragraph), or to "any other *class of* workers" rather than simply "any other . . . workers."

the version that does not result in surplusage or redundant statutory language as more likely reflecting Congress' true intent. Here, however, petitioner never gets to the threshold point of establishing the plausibility of its proffered construction. For the reasons stated above, there is no textual basis for reading the FAA §1 exclusion of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" as excluding only transportation-of-goods-in-commerce workers, or for concluding that Congress intended such a limited exclusion. The mere fact that Congress could have written FAA §1 in fewer words is far too slender a reed upon which to base petitioner's wholesale rewriting of the statutory text to say something quite different from what its actual words say.

Indeed, while petitioner attempts to give its surplusage argument a measure of credibility by offering alternative versions of §1 that Congress *might* have enacted to exclude all worker contracts of employment, its own proffered construction of the exclusion provision could also have been drafted differently – and far more directly – if Congress had truly intended to exclude transportation-of-goods-in-commerce workers only. Petitioner suggests that if Congress had meant to exclude all contracts of employment, FAA §1 might have stated: "nothing herein contained shall apply to contracts of employment" or – to parallel the §2 coverage provision while using conventional Commerce Clause language – "nothing herein contained shall apply to contracts of employment of workers engaged in foreign or interstate commerce." Pet. Br. 22-23. But by the same token, if Congress had meant to exclude only transportation-of-goods-in-commerce workers from the FAA, Congress could easily have stated "nothing herein contained shall apply to contracts of employment of workers engaged in the transportation of goods in interstate commerce" –language that would make the point far more clearly and directly than the text of FAA §1 as petitioner would have it read.

Fifth, and finally, petitioner's construction of the FAA §1 exclusion as being limited only to transportation-of-goods-in-commerce workers fails because it attributes to Congress an intent that makes no sense. There is nothing in the legislative record or in logic that begins to explain *why* Congress would have singled out only the employment contracts of transportation-of-goods-in-commerce workers to be excluded from the FAA.[16] And, construing the FAA §1 exclusion as

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[16] Petitioner itself characterizes as "[c]onjecture," "speculat[ion]," and "surmise[]" the only explanation that it offers – that Congress excluded seamen and railroad employees because federal legislation *already* provided a mechanism for enforcing those workers' employment arbitration agreements, and that Congress excluded "any other class of workers" to "round out" the list in the expectation that "motor carriers" and other like transportation workers would soon unionize and obtain similar federal arbitration legislation. Pet. Br. at 26-27. As pointed out by Prof. Finkin and others, there is *no* support in the legislative history for this explanation, and it makes no sense. *See* Finkin I, 17 Berkeley J. Emp. Lab. L. 282, 291-92 (1996); Matthew Finkin, *Employment Contracts Under the FAA – Reconsidered*, 48 Lab.L.J. 329, 331 (1997). In 1925, the only class of employees covered by a federal arbitration law were seamen – and the seamen's statute did *not* provide for judicial enforcement of arbitration. *See* Act of June 7, 1872, ch. 322, 17 Stat. 262, 267, 46 U.S.C. §651. Seamen's Union President Furuseth was strongly *opposed* to such enforceability, and his principal objection to the original version of the FAA bill was that it *would* likely make enforceable arbitration awards entered against workers such as his members. *See supra* at p. 12. Although the Railway Labor Act *later* included a mandatory arbitration provision, that provision was not enacted until 1926 (Railway Labor Act, ch. 347, 44 Stat. 577 (1926)), one year *after* the FAA was enacted. In 1925 railroad employees were governed by the Transportation Act of 1920, ch. 91, §300, 41 Stat. 469, which made no provision for enforcement of arbitration clauses in disputes affecting individual railroad employees. And, whether Congress gave thought to truck drivers, bus drivers, or other workers in the motor transport industry in adopting the §1 exclusion, the fact remains that in 1925 there were no federal arbitration laws applicable to those workers, or to any other class of workers either within or outside the transportation industry. It therefore made little sense for Congress to group any other class of workers with "seamen" and

narrower than the FAA §2 coverage provision leads to a result that is paradoxical at best. Under petitioner's reading of §1, those employment contracts *most* involving interstate commerce, and thus most assuredly within the Commerce Clause power in 1925 (*viz.*, contracts of employees engaged in interstate transportation) are *excluded* from Act's coverage; while those employment contracts having a *less* direct and less certain connection to interstate commerce – as to which federal regulation in 1925 would have been least supportable – would come *within* the Act's affirmative coverage and would not be excluded. Limiting coverage to those contracts *least* evidently within the reach of the federal constitutional authority justifying federal regulation is so anomalous that this Court should not attribute such an intent to Congress without the clearest evidence of such intent. *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 452-55 (1989).

In contrast, reading FAA §1 for what it quite evidently says makes perfect contextual sense, since there are entirely logical reasons for Congress to have excluded workers' contracts of employment as a class from the FAA. The historical record demonstrates that the proponents of the §1 exclusion drafted that language to satisfy objectors that the FAA would not cover employment contracts at all. The underlying *grounds* for that objection were the same whether the worker was a "seaman," a "railroadman" or one of the "sundry other workers in interstate or foreign commerce" (*supra*, at p. 12) – the perceived disparity in bargaining power between worker and employer.[17] The disparity in bargaining

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"railroad employees" as three classes of workers covered by a non-FAA federal arbitration law.

[17] In 1925, the heyday of the "yellow dog contract," Congress fully understood the disparity in bargaining power between employer and employee. Indeed, just six years after enacting the FAA, Congress declared that "under prevailing economic conditions, . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain

power between worker and employer that was the root of the objection to FAA coverage of worker employment contracts was a *general* concern – not a concern limited to workers engaged in the transportation of goods in commerce. Thus, only a general exclusion of *all* workers' "contracts of employment" from the Act would satisfy the objectors – and that is what the §1 exclusion accomplishes, reading its words for what they say.

IV. Respecting Congress' Intent to Exclude All Employment Contracts From the FAA Furthers Important Federalism Values

Ultimately, this case is as much about federalism and the *States'* power to regulate workers' contracts of employment under their own laws and in their own courts as it is about the enforceability of employment arbitration provisions. Many of petitioner's *amici curiae* misanalyze this case by proceeding as if the question were whether mandatory pre-dispute employment arbitration agreements will be enforceable or unenforceable, with the answer turning on whether the FAA covers such agreements. But that is to presume, contrary to

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acceptable terms and conditions of employment . . ." Norris-LaGuardia Act, ch. 90, §2, 47 Stat. 70 (1932), *codified at* 29 U.S.C. §102; *see also* FELA, ch. 3073, 34 Stat. 232 (1906) (invalidating workers' waivers of statutory FELA rights). Congress in broadly excluding all "contracts of employment" from the reach of the FAA, evidently concluded, as the Seamen's Union and American Federal of Labor had urged, that the presumed level of voluntariness in commercial arbitration agreements between merchants did not exist in employment arbitration agreements between employers and employees. *See Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 402 n.9 (1967) ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1").

fact, that state law uniformly makes employment arbitration agreements unenforceable.[18]

What this case is about, then, is whether challenges to the enforceability of most individual employment arbitration agreements will be governed by the FAA or by state law. A holding that Congress in the FAA preserved the States' authority to regulate individual employment contracts will not make arbitration provisions in those contracts uniformly unenforceable – it will allow the States to decide issues of enforceability and procedure under their own laws, pursuant to their own policies.[19] At the same time, federal courts will be precluded from invoking the FAA to enjoin state court adjudication of cases filed by state residents alleging state-law employment claims – as the district court did here.

Even in ordinary statutory interpretation cases, Congress will not be presumed to have intended to displace state law. *See, e.g., English v. General Electric*, 496 U.S. 72, 82-83 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). This presumption against preemption is heightened in areas of traditional state concern, where this Court has always "[s]tarted with the assumption that the historic police powers of the States were not to be superseded . . . unless that

[18] Although many state arbitration laws parallel the FAA, several States have enacted specific laws, cited in the State Attorneys' General *Amicus* Brief, regulating the enforceability of employment arbitration agreements, including arbitration agreements imposed unilaterally as a condition of employment. If the FAA applies to employment contracts of workers other than seamen, railroad employees, and workers directly engaged in foreign and interstate transportation of goods, those State laws will be preempted to the extent the law applies to classes of workers covered by the FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 16 & n. 11 (1984).

[19] Of course, in a case involving federal statutory rights as to which Congress "evinced an intention to preclude a waiver of judicial remedies" (*Gilmer*, 500 U.S. at 26, *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)), the federal anti-waiver rule would govern by reason of the Supremacy Clause.

was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989).

Regulation of the individual employer-employee relationship has long been the province of the States.[20] And, for the reasons already stated, there is no "clear and manifest" evidence in the text or legislative history of the FAA that Congress in 1925 intended to cover employment contracts, and thereby preempt state law.[21]

V. Circuit City's Policy Arguments Do Not Illuminate the FAA Congress' Intent

Petitioner Circuit City and its *amici curiae* conclude with a series of pro-arbitration policy arguments to justify their reading of the FAA. Those arguments are neither

[20] *See, e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987) (the establishment of labor standards falls within the traditional police powers of the State"); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992); *Second Employers Liability Cases*, 223 U.S. at 54-56. The States also have a considerable interest in providing their residents with access to a state court judicial system to adjudicate claims within those courts' jurisdiction. *See Atlantic Coast Line R.R. v. Broth. of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970); *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893); *Brown v. Gerdes*, 321 U.S. 178, 188-89 (1944) (Frankfurter, J., concurring); *cf. Perry v. Thomas*, 482 U.S. at 494 (O'Connor, J., dissenting).

[21] Indeed, several members of this Court have questioned whether the 1925 Congress, which enacted the FAA at a time when arbitration was thought to be a purely procedural matter to be decided by the forum court, intended to preempt *any* state laws. *See Perry v. Thomas*, 482 U.S. at 493, (Stevens, J. dissenting); *id.* at 494 (O'Connor, J., dissenting); *Southland Corp.*, 465 U.S. at 36 (O'Connor, J., joined by Rehnquist, C.J., dissenting); *Allied-Bruce Terminix*, 513 U.S. at 283 (O'Connor, J., dissenting); *id.* at 284-85 (Scalia, J., dissenting); *id.* at 293 (Thomas, J., joined by Scalia, J, dissenting).

relevant to elucidating the intent of the 1925 Congress nor persuasive on their own terms.

1. Petitioner and its *amici curiae* cite several cases describing a "liberal federal policy favoring arbitration," and argue that this policy compels a narrow construction of the FAA §1 exclusion.[22] But that argument is circular, since the source of the federal policy is the FAA itself, and the boundaries of that policy must therefore be co-extensive with the FAA's coverage *and* exclusion provisions. Just as the federal policy favoring arbitration does not apply to employment arbitration agreements of "seamen" and "railroad employees," so is it inapplicable to "any other class of workers" that Congress excluded from the Act's coverage. The Court cannot start with petitioner's conclusion – that the FAA's "policy favoring arbitration" applies to employment contracts – and reason backward to construe the intended scope of the Act. As the Ninth Circuit stated in *Craft*:

> [Defendant] argues that §2 of the FAA contains a broad policy favoring arbitration. Thus, interpreting the FAA to exclude employment contracts would conflict with that policy. However, the argument is circular; the very question to be answered is whether §2 and its broad policy apply to employment contracts at all. *See Perry v. Thomas*, 482 U.S. 483, 489 (1987) ("Section 2, therefore, embodies a clear federal policy of requiring arbitration *unless* the agreement to arbitrate is not part of a contract" satisfying the requirements of that section.) (emphasis added). We decline to bootstrap a policy argument to expand the scope of §2. [177 F.3d at 1085-86 n.5 (emphasis in original)]

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[22] As several of respondent's *amici* point out, that policy is more accurately characterized, where it applies, as a policy favoring *knowing and voluntary* arbitration, based on the premise that arbitration is a matter of "consent not coercion." *Volt Info. Services, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989); *see* EEOC Policy Statement on Alternative Dispute Resolution, 3 EEOC Compliance Manual (BNA) N:3055 (July 17, 1995).

2. Petitioner argues that a national employer that requires all workers to sign "a standardized arbitration agreement" as a condition of employment should not be faced with "conflicting and inconsistent state law," and that the importance of uniformity and predictability in employment relations suggests that Congress intended the FAA to cover all but a narrow category of contracts of employment. Pet. Br. 34. The immediate flaw in this argument is that it bears no relation to what Congress actually intended in 1925. The only workers over whom Congress might have had authority to impose a nationwide statute were, like seamen and railroad employees, workers engaged in foreign and interstate commerce. Yet Congress explicitly *excluded* those workers from the FAA. A perceived need for national uniformity in the enforcement of employment arbitration agreements could not have been a motivating factor underlying the FAA.[23]

Even if FAA §1 were as narrowly construed as petitioner urges, national uniformity would not be achieved. National employers are *already* subject to different employment statutes and common law principles in the different States.

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[23] We also note that additional non-uniformity would be *created* if petitioner's position were adopted. Heretofore, this Court has proceeded on the assumption that FAA §1 excludes all collective bargaining agreements ("CBAs") as a type of "contract of employment." *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 466-67 & n.2 (1957) (Frankfurter, J., dissenting) (perceiving in the Court's silence about the FAA, after full briefing, a "rejection though not explicit of the availability of the . . . Arbitration Act to enforce arbitration clauses in collective bargaining agreements"); *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 40 n.9 (1987) ("The Arbitration Act does not apply to 'contracts of employment' . . . but the federal courts have often looked to the Act for guidance in labor arbitration cases). If the FAA were construed to cover CBAs subject to a transportation-of-goods-in-commerce workers exclusion only, disputes regarding a single CBA could be treated differently – for example, with respect to an interlocutory appeal from a refusal to order arbitration – depending upon the particular job of the affected worker.

Mr. Adams' principal state law claim in this case, for example, is based on discriminatory same-sex retaliation and harassment – a claim recognized in California but not in many other states. Moreover, the FAA itself does not apply a uniform federal standard to issues of enforceability, but borrows general state unconscionability law to determine whether arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2; *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).[24]

3. Many of petitioner's *amici* offer an impassioned defense of employment arbitration and its perceived benefits and supposed fairness to workers. No one disputes that arbitration can be an excellent alternative to litigation when both parties *voluntarily* choose to arbitrate their disputes under fair procedures that ensure the protection of legal rights. But the paternalistic suggestion that employers unilaterally impose pre-dispute mandatory arbitration clauses on their workers for the benefit of those workers is not credible. Many academics and virtually all worker advocates dispute the assertion that workers benefit from their employers'

[24] While some of petitioner's *amici* make a related "reliance" argument, few employers order their business in reliance upon having federal rather than state law apply in the first instance to a question of arbitral enforceability. *Cf. Allied-Bruce Terminix*, 513 U.S. at 284-85 (Scalia, J., dissenting). Moreover, while those *amici* claim to have relied upon what they characterize as a virtually unbroken line of appellate authority, both the Ninth Circuit in *Craft*, 177 F.3d at 1086 n.6, 1087, and the Concerned Scholars in their Brief *Amicus Curiae*, point out that the position of the various circuits on the FAA §1 exclusion issue has diverged widely over the years. *See also* Br. in Opp. at 6-7 n.2. In addition, although this Court has had several opportunities to decide the issue itself since 1957, it has either expressly reserved the issue or has suggested, by its silence, that the FAA §1 exclusion is broad, and not limited to transportation workers.

imposition of such "agreements."[25] Permitting employers with vastly superior resources and bargaining power to dictate to their workers, as a condition of employment, the terms and procedures under which those workers may seek redress for the employers' own legal violations, thereby unilaterally substituting their own systems of justice for the legal enforcement mechanisms that Congress and the States have created, is not consistent with the goal of "fairness" extolled by petitioner's *amici*.

Although the enforceability of petitioner's arbitration provisions is not an issue presented to this Court, Circuit City's one-sided arbitration rules (J.A. at 13-14, 19-38) starkly demonstrate how unfair unilaterally-imposed pre-dispute arbitration terms can be, when dictated by an economically powerful employer to workers and job applicants who have no power to negotiate and no alternative but to quit their jobs or work elsewhere. *See Armendariz v. Foundation Health Psychcare Services, Inc.*, 2000 Cal. LEXIS 6120, __ Cal.4th __ (Cal. Sup. Ct. August 24, 2000). But, for the reasons stated, it should be the California state court, not the federal district court, that makes the enforceability determination in this case.

[25] *See, e.g.*, Briefs *Amicus Curiae* of the Lawyers' Committee for Civil Rights, Concerned Scholars, National Employment Lawyers Association, and American Association of Retired Persons, and authorities cited therein. Largely based on concerns of procedural and substantive unfairness resulting from mandatory pre-dispute arbitration programs imposed on workers by their economically more powerful employers, the EEOC, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution have each announced policies opposing the enforceability of condition-of-employment arbitration programs with regard to statutory discrimination claims.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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